

COOLEY GODWARD KRONISH LLP
 GREGORY C. TENHOFF (154553) (tenhoffgc@cooley.com)
 WENDY J. BRENNER (198608) (brennerwj@cooley.com)
 LAURA A. TERLOUW (260708) (lterlouw@cooley.com)
 Five Palo Alto Square
 3000 El Camino Real
 Palo Alto, CA 94306-2155
 Telephone: (650) 843-5000
 Facsimile: (650) 857-0663

FULBRIGHT & JAWORSKI L.L.P.
 ROBERT A. BURGOYNE (rburgoyne@fulbright.com)
 801 Pennsylvania Avenue, N.W.
 Suite 500
 Washington, D.C. 20004
 Telephone: (202) 662-0200
 Facsimile: (202) 662-4643

Attorneys for Defendant
 NATIONAL CONFERENCE OF BAR EXAMINERS

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

STEPHANIE ENYART,

 Plaintiff,

 v.

 NATIONAL CONFERENCE OF BAR
 EXAMINERS, INC., ACT, INC., AND THE
 STATE BAR OF CALIFORNIA,

 Defendants.

Case No. C09-05191 CRB

**DEFENDANT'S OBJECTIONS TO
 EVIDENCE SUBMITTED BY PLAINTIFF IN
 SUPPORT OF PLAINTIFF'S MOTION FOR
 PRELIMINARY INJUNCTION**

Date: January 29, 2010
 Time: 10:00 a.m.
 Courtroom: 8
 Before: Hon. Charles Breyer

Defendant National Conference of Bar Examiners ("NCBE") hereby objects to the following evidence presented by Plaintiff Stephanie Enyart ("Enyart") in support of her Motion for Preliminary Injunction, set for hearing before this Court:

///

///

///

///

1 **I. VIDEO**

2 In support of her Motion for Preliminary Injunction, Enyart submitted a video (the “Video”),
3 which is attached as Exhibit B to the Declaration of Michael Hofmayer In Support of Plaintiff’s
4 Motion for Preliminary Injunction. NCBE objects to portions of that video on the bases set forth
5 below.

6 **Specific Evidence:** Chapter One, which displays Enyart sitting at a desk while talking
7 to the camera.

8 **Bases for Objection:**

9 (a) NCBE objects to Chapter One on the grounds that it is the equivalent of live
10 testimony, which is not permitted on a motion for preliminary injunction. Northern District Local
11 Rule 7.6.

12 (b) NCBE further objects to Chapter One on the grounds that it testimony not under
13 oath or affirmation. FRE 603.

14 (c) NCBE further objects to Chapter One on the grounds that it is inadmissible
15 hearsay because it constitutes out-of-court statements not subject to cross-examination. FRE 801,
16 802.

17 **Specific Evidence:** Chapter Three, which displays Enyart using JAWS software alone
18 (that is, without ZoomText).

19 **Basis for Objection:** NCBE objects to Chapter Three on the grounds that it is irrelevant.
20 FRE 402. Enyart has not requested the use of JAWS alone as an accommodation, nor has the use
21 of JAWS alone been offered as an accommodation by NCBE. Accordingly, the reasonableness of
22 JAWS alone as an accommodation is not at issue in this litigation.

23 **Specific Evidence:** Chapter Four, which includes: (i) a narrative by Enyart describing
24 her use of a CCTV; and (ii) a demonstration by Enyart of her use of a CCTV.

25 **Bases for Objection:**

26 (a) NCBE objects to the narrative portion of Chapter Four on the grounds that it is the
27 equivalent of live testimony, which is not permitted on a motion for preliminary injunction.
28 Northern District Local Rule 7.6.

1 (b) NCBE further objects to the narrative portion of Chapter Four on the grounds that
2 it is testimony not under oath or affirmation. FRE 603.

3 (c) NCBE further objects to the narrative portion of Chapter Four on the grounds that
4 it is inadmissible hearsay because it constitutes out of court statements not subject to cross-
5 examination. FRE 801, 802.

6 (d) NCBE objects to the demonstration portion of Chapter Four on the grounds that it
7 is irrelevant. FRE 402. Enyart is purporting to demonstrate why a CCTV is not a reasonable
8 accommodation for her, yet she is not demonstrating the CCTV in a manner that is equivalent to
9 what has been offered to her as a reasonable accommodation. First, she is using text that is
10 printed with standard margins, which requires side to side sweeping to advance down a page of
11 text. On the MBE and MPRE, the text could be printed with sufficiently large margins to
12 eliminate the need for side to side sweeping. Declaration of David Damari in Support of NCBE's
13 Opposition to Plaintiff's Motion for Preliminary Injunction ¶ 11.b.iii. Furthermore, Enyart is
14 using the CCTV without simultaneous audio input. NCBE has informed Enyart that she is
15 permitted to supplement her use of a CCTV with either a human reader or a CD-recorded version
16 of the examination. Declaration of Erica Moeser in Support of NCBE's Opposition to Plaintiff's
17 Motion for Preliminary Injunction ¶ 6. Because the simultaneous audio input is not included in
18 the demonstration portion of Chapter 4, the demonstration is not simulating the accommodations
19 that have been offered, and thus the demonstration is not relevant to any matter at issue.

20 (e) NCBE further objects to the demonstration portion of Chapter Four on the grounds
21 that its probative value is substantially outweighed by the danger of unfair prejudice or confusion.
22 FRE 403. In the Chapter 4 demonstration, Enyart moves the CCTV stage very quickly. As a
23 result, the demonstration suggests that a CCTV produces a blurry, out of focus image that is
24 likely to result in nausea. The CCTV stage, however, is supposed to be moved slowly. Damari
25 Declaration ¶ 11.b.iii. With proper use, there is no loss of focus or blurriness, and minimal risk of
26 nausea. *Id.* Because the demonstration does not accurately represent CCTV functioning, the
27 demonstration is likely to result in confusion and unfair prejudice.

28

1 **II. DECLARATION OF SILVANA RAINEY IN SUPPORT OF PLAINTIFF’S MOTION FOR**
 2 **PRELIMINARY INJUNCTION.**

3 Enyart has submitted the Declaration of Silvana Rainey In Support of her Motion for
 4 Preliminary Injunction (the “Rainey Declaration”). NCBE objects to portions of the Rainey
 5 Declaration, as set forth below, on the grounds set forth below.

6 **Specific Evidence:** Paragraphs 11 through 18 of the Rainey Declaration, which set forth
 7 Rainey’s opinion that JAWS and ZoomText are the most effective accommodations for Enyart’s
 8 functional limitation; and Paragraphs 19 through 23 of the Rainey Declaration, which set forth
 9 Rainey’s opinion that the accommodations that have been offered to Enyart are not effective
 10 accommodations for Enyart’s functional limitation.

11 **Bases for Objection:**

12 NCBE objects to Paragraphs 11 through 23 of the Rainey Declaration on the grounds that
 13 Rainey does not have the requisite knowledge, skill, experience, training or education to qualify
 14 as an expert on the matters on which she is opining. FRE 702. Rainey is not a doctor.
 15 Deposition of Silvana Rainey at 12:15-19, attached to the Declaration of Gregory Tenhoff In
 16 Support of Defendant’s Opposition to Plaintiff’s Motion for Preliminary Injunction at Exhibit E.
 17 She has no medical knowledge, skill, experience, training, or education. *Id.* She did not review
 18 Enyart’s medical records to obtain an understanding of her functional impairments, and did not
 19 conduct any testing related to Enyart’s functional impairment. (*Id.* at 65:4-13.)

20 Thus, Rainey does not have the knowledge, skill, experience, training or education to
 21 opine as to the nature or effects of Enyart’s functional impairment, and which accommodations
 22 are reasonable in light of this impairment. *See Hubbard v. Rite Aid Corp.*, 433 F. Supp. 2d 1150,
 23 1160-61 (S.D. Cal. 2006)(nurse with primary expertise in medical field unrelated to disability at
 24 issue did not have sufficient training, experience or specialized knowledge to render an opinion
 25 on plaintiff’s disability.). Rainey is not qualified to assess Enyart’s impairment from a medical
 26 standpoint, and to the extent Rainey is assessing Enyart’s impairment based on some other
 27 criteria, she is not basing her opinion on sufficient facts or data. FRE 702; *Farley v. Gibson*

1 *Container, Inc.*, 891 F. Supp. 322, 326 (N.D. Miss. 1995)(medical information critical in
2 establishing impairment).

3 NCBE respectfully requests that the Court sustain the above objections and strike the
4 evidence referred to above.

5 Dated: January 8, 2010

COOLEY GODWARD KRONISH LLP
GREGORY C. TENHOFF (154553)
WENDY J. BRENNER (198608)
LAURA A. TERLOUW (260708)

8
9 /S/

Gregory C. Tenhoff (154553)
Attorneys for Defendant
NATIONAL CONFERENCE OF BAR
EXAMINERS